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January 2008

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Signaling Through Board Diversity: Is Anyone Listening?

Lissa Lamkin Broome[*] *& Kimberly D. Krawiec*[**]

Abstract: The ethnic and gender make-up of corporate boards has been the subject of intense public and regulatory focus in many countries, including the United States, in recent years. Of particular interest has been quantitative research on the impact, if any, of board diversity on corporate performance. This body of work leaves substantial gaps in our understanding of the precise mechanisms by which board diversity may alter the corporate environment, if indeed it does. In this Symposium, we discuss some preliminary findings from our first thirty-five of a series of confidential, semi-structured interviews of 45 to 90 minutes in length with corporate directors and other interested parties. Due to multiple board service, these interviews represent ninety-six public company board experiences at eighty-five different public companies.

We limit our discussion in this Symposium to an analysis of the rationale for board diversity that figured most prominently in interviews with our initial sample of respondents: signaling theory. Although signaling is frequently mentioned by our respondents and other researchers as a rationale supporting board diversity, we conclude that the distribution of costs and benefits of board diversity in "good" firms versus "bad" firms is unknown. We thus are unable to conclude that "bad" firms are not mimicking the signal, undermining the stability of board diversity as a meaningful signal. We, therefore, approach blanket assertions of the signaling benefits of board diversity with caution. We conclude that the signaling rationale for board diversity is at its strongest under particular conditions that may not exist in all corporations at all times.

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I. INTRODUCTION

The ethnic and gender make-up of corporate boards has been the subject of intense public and regulatory focus in many countries, including the United States, in recent years.[1] Moreover, researchers have begun to turn their attention to the issue of board diversity, recently publishing a number of books, articles, and studies on the topic.[2]

Of particular interest has been research on the impact, if any, of board diversity on corporate performance. Recent quantitative studies primarily test for a relationship

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[1]. The most prominent example is Norway, which in 2006 enacted legislation requiring that, by 2008, roughly 40% of public company board seats be held by women. Stephanie Holmes, *Smashing the Glass Ceiling*, BBC NEWS, Jan. 11, 2008, http://news.bbc.co.uk/2/hi/business/7176879.stm. As of January 2008, women held close to 38% of board seats at Norwegian public corporations, by far the world's highest percentage. *Id.* The news prompted claims of victory from the legislation's advocates, as well as charges of quotas, window-dressing, and divisiveness from opponents. *Id.*

In the United States, dozens of advocacy groups are dedicated to promoting board diversity, by measuring it, studying it, or providing training or mentoring to potential female or minority board members. *See, e.g.*, The Alliance for Board Diversity (ABD), The Alliance for Board Diversity Factsheet 1-2 (2005), http://www.myjaxchamber.com/upload/boardminorities.pdf. ABD partners include other advocacy groups such as Catalyst, http://www.catalyst.org (advancing women in business); The Executive Leadership Council, http://www.elcinfo.com (advancing African-Americans); and the Hispanic Association on Corporate Responsibility, http://www.hacr.org (advancing Hispanics). Other groups include the InterOrganization Network (ION) (advancing women); Corporate Women Directors International, http://www.globewomen.comcwdi/CWDI.htm (same); DirectWomen, http://www.abanet.org/buslaw/directwomen/ (same); the Center for Executive Women, http://www.kellogg.northwestern.edu/research/cew (same); and the Director Diversity Initiative, https://ddi.law.unc.edu/default.aspx (advancing women and minorities).

[2]. *See, e.g.*, DOUGLAS M. BRANSON, NO SEAT AT THE TABLE: HOW CORPORATE GOVERNANCE AND LAW KEEP WOMEN OUT OF THE BOARDROOM (2007); Jayne M. Barnard, *More Women on Corporate Boards? Not So Fast*, 13 WM. & MARY J. WOMEN & L. 703 (2007); Lynne L. Dallas, *The New Managerialism and Diversity on Corporate Boards of Directors*, 76 TUL. L. REV. 1363 (2002); Lisa M. Fairfax, *Clogs in the Pipeline: The Mixed Data on Women Directors and Continued Barriers to Their Advancements*, 65 MD. L. REV. 579 (2006); Lisa M. Fairfax, *The Bottom Line on Corporate Board Diversity: A Cost-Benefit Analysis of the Business Rationales for Diversity on Corporate Boards*, 2005 WIS. L. REV. 795 [hereinafter Fairfax, *The Bottom Line*]; Lisa M. Fairfax, *Some Reflections on The Diversity of Corporate Boards: Women, People of Color, and the Unique Issues Associated with Women of Color*, 79 ST. JOHN'S L. REV. 1105 (2005); Donald J. Polden, *Forty Years After Title VII: Creating an Atmosphere Conducive to Diversity in the Corporate Boardroom*, 36 U. MEM. L. REV. 67 (2005); Steven A. Ramirez, *Games CEOs Play and Interest Convergence Theory: Why Diversity Lags in America's Boardrooms and What to Do About It*, 61 WASH. & LEE L. REV. 1583 (2004); Steven A. Ramirez, *A Flaw in the Sarbanes-Oxley Reform: Can Diversity in the Boardroom Quell Corporate Corruption?*, 77 ST. JOHN'S L. REV. 837 (2003); *see also* sources cited *infra* notes 3-7.

between board diversity and various measures of corporate performance.[3] For example, some studies find evidence that the authors conclude is consistent with the theory that board diversity positively affects firm performance.[4] Other studies, however, find no support for this theory, or even find contradictory evidence.[5]

Some researchers have attributed these divergent findings to the difficulty of fully controlling for endogeneity and reverse causation, which are thorny issues in studies of this type.[6] Studies of board diversity and firm performance present difficult issues of

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[3]. In addition, a few qualitative studies address the topic of board diversity. *See*, *e.g.*, Vicki W. Kremer et al., *Critical Mass On Corporate Boards: Why Three or More Women Enhance Governance* (Wellesley Ctrs. for Women Working Paper Series, Report No. WCW 11, 2006), *available at* http://www.tiaa-crefinstitute.org/research/grants/docs/CriticalMassreport.pdf (interviews and discussions with fifty women directors, twelve CEOs, and seven corporate secretaries from Fortune 1000 companies); ERIKA HAYES JAMES & LYNN PERRY WOOTEN, INST. FOR LEADERSHIP DEV. & RESEARCH, THE EXECUTIVE LEADERSHIP COUNCIL, IMPLICATIONS AND RECOMMENDATIONS OF THE 2004 CENSUS OF AFRICAN AMERICANS ON BOARDS OF DIRECTORS PART II OF II (2006), http://www.elcinfo.com/6_6_06_ELC_Census_Part_II.pdf (telephone interviews with thirty-five African American directors).

[4]. See, e.g., David Carter, et al., *The Diversity of Corporate Board Committees and Firm Financial Performance* (Mar. 15, 2007) (unpublished manuscript), *available at* http://ssrn.com/abstract=972763 (reporting the results of a cross-section fixed-effects procedure with lagged variables and a three-stage least-squares estimation that support the hypothesis that board diversity positively affects financial performance as measured by Tobin's *q*); David Carter et al., *Corporate Governance, Board Diversity, And Firm Value*, 38 FIN. REV. 33 (2003) (finding that Tobin's *q* is positively related to both the percentage of female directors and the percentage of minority directors); Niclas L. Erhardt et al., *Board of Director Diversity and Firm Financial Performance*, 11 CORP. GOVERNANCE 102 (2003) (finding that the percentage of Caucasian females plus ethnic minority directors on the board is positively related to both Return on Equity (ROE) and Return on Assets (ROA)).

[5] See, e.g., Øyvind Bøhren & R. Øystein Strøm, *Boards & Politics*, (draft of Aug. 21, 2008) (finding a negative association between corporate performance and board gender diversity in a sample of all non-financial firms listed on the Oslo Stock Exchange from 1989-2002); Caspar Rose, *Does Female Board Representation Influence Firm Performance? The Danish Evidence*, 15 CORP. GOVERNANCE 404, 412 (2007) (finding no effects of board gender diversity on corporate performance in a sample of Danish firms and urging case studies to shed light on the role played by female directors in board decision-making); Charles B. Shrader et al., *Women In Management and Firm Financial Performance: An Exploratory Study*, 9 J. MANAGERIAL ISSUES 355 (1997) (finding no relationship between the percentage of female directors and profit margin, ROA, or ROE); Shaker A. Zahra & Wilbur W. Stanton, *The Implications of Board of Directors' Composition for Corporate Strategy and Performance*, 5 INT'L J. MGMT. 229 (1988) (finding no relationship between the percentage of females plus ethnic minorities on the board and ROA, profit margin, sales to equity, Earnings Per Share (EPS), or dividends).

[6] See, Renee B. Adams and Daniel Ferreira, *Women in the Boardroom and Their Impact on Governance and Performance* (Oct. 22, 2008). Available at SSRN: http://ssrn.com/abstract=1107721 (referencing studies finding a positive relationship between board diversity and corporate performance, but concluding that they do not fully address problems of endogeneity and reverse causation, rendering causal interpretations difficult); Annelies Renders & Ann Gaeremynck, *Corporate Governance and Performance: Controlling for Sample Selection Bias and Endogeneity*, K.U. Leuven AFI Working Paper No. 0606 (draft of March 3, 2006 (stating that "[a]n important issue in studying the relation between corporate governance

causation because, although board diversity could create value for shareholders, a positive relationship between board diversity and firm performance could also indicate: (1) that more successful firms have greater resources to dedicate to the pursuit of board diversity, (2) that more successful firms are under greater public scrutiny and pressure as regards board diversity, or (3) that female and minority directors are scarce commodities who can choose to serve only on the boards of more successful firms.[7]

This body of empirical work, although a necessary starting point, leaves substantial gaps in our understanding of the precise mechanisms by which board diversity may alter the corporate environment, if indeed it does. For those studies lending support to the theory that board diversity positively impacts firm performance, which of the numerous rationales offered in favor of board diversity is at work? Do diverse boards operate differently than homogenous ones? If so, how? Does board diversity impact corporate constituency or public relations in difficult-to-measure ways that are unrelated to board processes?

Similarly, studies finding no support for the theory that board diversity affects corporate performance shed little light on why this might be so. Do diverse boards entail both positive and negative consequences that result in findings of no significance when measured quantitatively? Or, more cynically, are diverse directors little more than public

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and firm performance is the direction of causation"); Sanjai Bhagat & Bernard Black, *The Non-Correlation Between Board Independence and Long-Term Firm Performance*, 27 J. Corp. L. 231, 237 (2002) (noting that, [b]oard composition could affect firm performance, but firm performance can also cause the firm to change its board composition.")

[7]. *See, e.g.*, Kathleen A. Farrell & Philip L. Hersch, *Additions to Corporate Boards: The Effect Of Gender*, 11 J. CORP. FIN. 85 (2005) (finding a significant, positive relation between ROA and the likelihood of adding a woman to the board, but failing to detect a significant market reaction to the addition of a female board member, thus undercutting the case for causation); Adams & Ferreira, *supra* note 6 at 3 (stating that, "although the correlation between gender diversity and either firm value or operating performance appears to be positive at first inspection, this correlation disappears once we apply reasonable procedures to tackle omitted variables and reverse causality problems," and concluding that, on average, firms with greater gender diversity on the board perform worse).

relations tokens designed to quiet vocal critics, but having little or no impact on board or corporate operations?

Finally, are those studies finding a negative relationship between board diversity and various aspects of firm performance generalizable to firms and contexts outside of those studied? And what is it about board diversity that may be driving these negative findings?

Clearly, more theoretical and empirical work is needed to fully flesh out the specific means, if any, by which board diversity may impact corporate performance. Indeed, some empirical researchers have called for qualitative studies of precisely the type introduced here as a means to shed light on the more intractable issues that quantitative study has been unable to fully answer.[8]

Part II outlines our study methodology and details the characteristics of sample respondents and firms. Part III discusses our preliminary findings. As discussed in Part III.A., our preliminary findings are consistent with prior quantitative findings of intentional corporate efforts at board diversification. Part III.B. explores why business organizations have purposely pursued an agenda of board diversification. Elsewhere, we discuss at length the rationales for board diversity offered by our respondents and situate those rationales within existing theoretical and empirical debates on board diversity.[9] Here, however, we limit our discussion to the rationale for board diversity that seemed to resonate most strongly with our initial sample of respondents: signaling theory.

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[8]. *See, e.g.*, Val Singh et al., *Women Directors on Top UK Boards*, 9 CORP. GOVERNANCE 206 (2002) (arguing that theories linking board diversity and firm performance are not well developed and urging further study of the methods by which female and minority directors contribute to corporate performance); *see also* Rose, *supra* note 7, 412-13 (calling for case studies to enhance the understanding of the relation, if any, between board diversity and corporate performance).

[9]. Lissa Lamkin Broome, John M. Conley & Kimberly D. Krawiec, *Board Diversity & Corporate Performance: Filling in the Gaps* (forthcoming 2009) (on file with author).

Part III.C. notes that, although signaling theory is frequently mentioned by our respondents and other researchers as a rationale supporting board diversity, the distribution of costs and benefits of board diversity in "good" firms versus "bad" firms is unknown.[10] We thus are unable to conclude that bad firms are not mimicking the signal, undermining the stability of board diversity as a meaningful signal. Part IV concludes that the signaling rationale for board diversity may be strongest under particular conditions unlikely to exist in all corporations at all times.

II. STUDY METHODOLOGY

In a forthcoming project, *Board Diversity and Corporate Performance: Filling in the Gaps*, we seek, together with John M. Conley, to supplement existing quantitative study of the impact of racial and gender diversity on board processes and corporate performance through a series of confidential, semi-structured interviews of 45 to 90 minutes in length with a minimum of fifty corporate directors, as well as senior executives, executive recruiters, shareholder activists, proxy advisors, and regulators.[11] In this Symposium, we discuss some preliminary findings from our first thirty-five interviews, thirty of which were with public company board members.[12] Due to multiple board service, these interviews represent ninety-six corporate board experiences at

[10]. As elaborated below, the qualities of interest typically thought to be signaled through board diversity are equal opportunity in the workplace, attention to the needs of women and minorities in product and service development and provision, or that the firm is "progressive" or "forward-looking" in some other meaningful way—hereafter labeled "good" firms. *See infra* notes 54-69 and accompanying text (discussing these qualities in more detail).
[11]. *See* Broome, Conley & Krawiec, *supra* note 9.
[12]. The remaining five respondents represent other categories of interest. *See infra* notes 18-19 and accompanying text (discussing the breakdown of respondents in more detail).

eighty-five different public companies.[13] All interviews were tape recorded and transcribed for accuracy.[14] In addition to being asked to discuss their board experiences, respondents were asked to verify biographical information such as race, ethnicity, and board service.

A. Sample Construction

Respondents were selected nonrandomly using the "snowball" sampling method.[15] Snowballing is a commonly employed methodology (particularly in interview-based research) for reaching difficult to access populations, such as the homeless, the socially stigmatized, or the elite. [16] As stated by Atkinson and Flint, the main value of the snowballing methodology:

> [L]ies as a method for dealing with the difficult problem of obtaining respondents where they are few in number or where higher levels of trust are required to initiate contact. Under these circumstances, such techniques of "chain referral" may imbue the researcher with characteristics associated with being an insider or group member which can aid entry to settings in which conventional approaches have great difficulty.[17]

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[13]. *See infra* note 18 (discussing the relationship between the number of respondents, the number of board experiences, and the number of firms in the sample).

[14] With the exception of one interview, which was conducted by telephone, all interviews were conducted in person by two of the three study co-authors (Broome, Conley, and Krawiec).

[15]. Snowball sampling is a sample design in which respondents are asked to suggest other potential study subjects according to some inclusion criteria defined by the researchers (such as someone knowledgeable about the study question or with power in the area). We began by contacting and interviewing public company board members with whom one or both co-authors had direct or indirect personal or professional contacts. At the conclusion of each interview, the respondent was asked to name other potential interview subjects (or to contact them on our behalf). The process was then repeated with these new respondents, and so on. Because the sample selection is nonrandom, samples generated through the snowballing method present problems of sample bias.

[16]. *See* Jean Faugier & Mary Sargeant, *Sampling Hard to Reach Populations*, 26 J. ADVANCED NURSING 790 (1997); Rowland Atkinson & John Flint, *Snowball Sampling*, *in* THE SAGE ENCYCLOPEDIA OF SOCIAL SCIENCE RESEARCH METHODS 1044 (Michael S. Lewis-Beck, et al., eds., 2004).

[17]. Atkinson & Flint, *supra* note 16, at 1044.

Snowball sampling is particularly useful in recruiting corporate director respondents for a variety of reasons. First, directors of public corporations are a relatively small and homogenous population. Moreover, they are busy people who frequently are reluctant to devote time to a person or project not recommended by someone they already know and trust. This may be especially true when, as here, respondents are asked to comment on sensitive topics ranging from the performance and behavior of board colleagues, to their own and others' views of the contributions of female and minority board members.

B. Characteristics of Respondents and Firms

Figure 1 details the racial and gender breakdown of respondents. As of December 7, 2008, our sample contained a total of thirty directors representing ninety-six public company board experiences at eighty-five distinct public companies.[18] Five additional respondents (three white males and two white females) had no public company board experience but fell within other categories of interest – executive recruiters, shareholder activists, proxy advisors, or regulators.

1. Respondent Characteristics

Of the thirty-five respondents in our sample, thirty are or have been public company directors. Of those with experience as directors, nineteen (or 63.33%) are

[18]. The number of "public company board experiences" is larger than the number of distinct public companies represented in the sample because several director-respondents served with each other on at least one board. To illustrate, assume that two respondents, Mary and John, both serve on the board of Alpha Corporation and, in addition, John serves on the board of Beta Corporation. The result is: two individual respondents (Mary and John) and three board experiences (Mary's experience on Alpha Corporation, John's experience on Alpha Corporation, and John's experience on Beta Corporation) at two distinct firms (Alpha Corporation and Beta Corporation).

Of the thirty board member respondents, three were CEOs serving as inside directors on their corporation's board.

female, and six (or 20%) are non-white.[19] Currently, males are underrepresented in the sample, compared to their percentages on Fortune 500 boards (36.67% in our sample versus 85.2% of Fortune 500 board seats).[20] Women, in contrast, are overrepresented, relative to their numbers on Fortune 500 boards (63.33% in our sample versus 14.8% of Fortune 500 board seats). Although we anticipate increasing the percentage of white males in the sample prior to the study conclusion, we expect that women will continue to be overrepresented in the sample.[21]

Figure 1

Race and Gender of Respondents

[insert figure 1 here]

As indicated in Figure 2, our sample of thirty directors is diverse in terms of their board experience. The least experienced director in our sample has only one year of public company board service and has served on only a single board, while each of the three most experienced directors has more than fifty years of total public company board experience at multiple public companies. Of our total sample, eight (or 26.67%) have served fewer than six years as a public company director, ten (or 33.33%) have served six to fifteen years, five (or 16.67%) have served sixteen to twenty-five years, and seven (or 23.33%) have served more than twenty-five years.

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[19]. Of non-white respondents, four self-identify as African-American, and two self-identify as Hispanic.

[20]. CATALYST, INC., 2007 CENSUS: BOARD DIRECTORS: WOMEN GAIN BOARD COMMITTEE CHAIRS IN THE FORTUNE 500, OVERALL REPRESENTATION STAGNATES 1 (2007), *available at* http://www.catalyst.org/file/3/census_board.pdf.

[21]. This may be a function of the snowball sampling method (female respondents seemed more likely to identify other females as potential respondents); a response bias triggered by the identity of the two authors (women may feel more comfortable talking to the authors -- two white women -- than do members of other demographic groups, leading to a higher response rate among women); or of the subject matter (women and minority directors may naturally be more interested in the subject matter). Professor John M. Conley (a white male) has joined the study and will participate in some of the remaining interviews, particularly where the respondent is male.

Figure 2

Board Experience
Years Served on Public Company Boards

[insert figure 2 here]

2. Firm Characteristics

A diverse group of eighty-five firms are represented in our sample. Because some of the respondents serve on the boards of the same companies, our respondents reported ninety-six board experiences. For nine companies, there were two respondents from the company's board, and for one company there were three respondents who served on that company's board. Figure 3 details the breakdown of board experiences by size of firm. Thirteen (or 13.54%) of sample firms are in the Fortune 100, twenty (or 20.83%) are in the Fortune 500, ten (or 10.42%) are in the Fortune 1000, and fifty-three (or 55.21%) are publicly traded corporations not listed in Fortune.

Figure 3

Firm Size

[insert figure 3 here]

Figure 4 details the breakdown of board experiences by the region where the firm is headquartered.[22] Sixteen board experiences (or 16.67%) represent firms headquartered in the northeast, eight (or 8.33%) represent firms headquartered in the Midwest, fifty-five (or 57.29%) represent firms headquartered in the south, and seventeen (or 17.71%) represent firms headquartered in the West.

Figure 4

[22]. The firm's region is defined by reference to its corporate headquarters as disclosed in SEC filings. The regions are those employed by the U.S. Census Bureau.

Firm Headquarters

[insert figure 4]

Figure 5 details the breakdown of board experiences by industry, using broad standard industrial code (SIC) classifications.[23]

Figure 5

Industry Breakdown

[insert figure 5]

III. FINDINGS

We discuss the insights gleaned from our respondent interviews more fully outside of this article.[24] Here, we limit our discussion to an issue that has received much attention from researchers and others interested in the question of board diversity. For those boards with some level of racial and ethnic diversity, is the board's composition the result of specific efforts to diversify? And if so, why? What goals were firms attempting to accomplish through these diversity efforts, and have those goals been satisfied? In other words, do public corporations care about diversity on their boards of directors and, if so, why do they care?

A. Diversity Efforts

The level of gender, racial, and ethnic diversity on U.S. public company boards has increased over the past several decades. For example, in 1993 the percentage of

[23]. The four digit Standard Industrial Classification (SIC) Codes that appear in a company's disseminated EDGAR filings are assigned by the U.S. government to indicate the company's type of business. Because there was no SIC code provided for one sample firm, that firm is excluded from Figure 5.
[24]. *See* Broome, Conley & Krawiec *supra* note 9.

Fortune 500 firms with no women on the board was 51%.[25] By 2007, however, that percentage had fallen to 12%.[26] In 1973, 93% of Fortune 1000 companies had no minority directors.[27] That percentage had declined to 24% by 2004.[28]

Yet, we wondered to what extent this diversification has simply been a natural shift in board demographics as workplace demographics have changed, or whether public companies have actively focused on efforts to represent women and minorities on boards of directors. When asked about their own appointment to a public company board, we find it striking that nearly every female or minority respondent acknowledged that his or her gender, race, or ethnicity had been a factor in the respondent's selection as a board member.[29] Indeed, in some cases the attraction of the respondent's race, ethnicity, or gender was explicitly stated to the respondent at the outset as a relevant factor in the selection. Perhaps not surprisingly, female and minority respondents were careful to add that they considered themselves well-qualified for the position—in many cases, more qualified than their white, male counterparts.

An exchange with one female respondent is representative:

> Q: Was, from your perspective, did it seem that you being a woman was a factor in either of the two [public company board] appointments?
>
> A: It was absolutely a factor in both and it was positioned to me that way. The conversation went something like we admire your professional

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[25]. CATALYST, INC., WOMEN ON CORPORATE BOARDS: THE CHALLENGE OF CHANGE 7 (1993), *available at* http://www.catalyst.org/file/227/women_on_corporate_boards_the_challenge_of_change.pdf.

[26]. *See* CATALYST, INC., *supra* note 17, at 1. In recent years, however, female and African-American representation on Fortune 500 boards has remained stagnant or, by some measures, fallen. *Id.*; Alliance For Board Diversity, *Women and Minorities on Fortune 100 Boards* (2008), *available at* http://www.elcinfo.com/downloads/docs/Final_1_22_08.pdf.

[27]. Fairfax, *The Bottom Line*, *supra* note 2, at 800 (citing BUS. FOR SOC. RESPONSIBILITY, BOARD DIVERSITY ISSUE BRIEF (2003), http://www.bsr.org/research/issue-brief-details.cf m?DocumentID=443).

[28]. *Id.* at 799 (citing KORN/FERRY INT'L, 31ST ANNUAL BOARD OF DIRECTORS STUDY 11 (2004)).

[29]. Quantitative studies confirm this finding of intentional board diversification across Fortune 500 companies. *See, e.g.*, Farrell & Hersch, *supra* note 7, at 86 (finding evidence of a diversity goal in adding female directors to Fortune 500 boards).

> experience. We've seen you operate in a number of different settings. We think you could add value with particularly your financial background. We like the fact that you've been in financial services with a big company, you've been an entrepreneurial and a start up company and you've managed a lot of people. But also, you're a female and quite frankly, we're looking for a female. We don't want you to, in any way, think that we think less of your characteristics and skill set or any of that because you're a woman but quite frankly, we do want to have a woman on the board.[30]

A similar exchange with an African-American respondent is also informative:

> Q: Can you tell us how you came to be on that board?
>
> A: Interesting situation. A friend of mine . . . was a friend of the CEO. . . . [and he] asked my friend if he knew of anyone who would be willing to come on board. They wanted to diversify the board. And my name bubbled up and we went through the interview kabuki and that's how I ended up on [Company X's] board.
>
> Q: So they were specifically looking for an African American?
>
> A: Yes.[31]

Additionally, in response to questions regarding the appointment of other board members who were female or minority, respondents (including white male respondents) were fairly uniform in their statements that race, ethnicity, or gender had been a factor in those appointments, sometimes explicitly. For example, consider the following exchange with a respondent who is a long-time board member of a Fortune 500 corporation and, in that capacity, has seen the corporation progress from an entirely white male board to a highly diverse board, as compared to peer corporations:

> Q1: As the board diversified and you were there to see it, was it a conscious choice? Was that on the agenda to diversify the board?
>
> A: Yes. Yes. Very clearly. Now not so in the [Company X] case because I am the third of the three women to join so I didn't observe that. But in the [Company Y] case there has been a very conscious effort under [the

[30]. Transcript No. DS300010, p. 3, July 30, 2007.
[31]. Transcript No. DS300024, p. 2, Dec. 4, 2007.

> current CEO]'s leadership to diversify his senior management team and to diversify the board and so -- I think with no compromise on qualifications -- but to really look hard to ensure we had more diverse representation in their board . . . .[32]

Although there were some exceptions, respondents expressed the overall view that, despite the conscious focus on the race, ethnicity, or gender of some directors, minority and female directors were well-qualified for the job, and performed well as board members who deserved—and received—the respect of their director colleagues. In a few cases, when asked about a fellow female or minority director, respondents (including respondents who were not white males) indicated that the director in question was not performing on a level with the rest of the board. In most cases, they attributed this to a lack of business or board experience, particularly when the director in question had come from academia or the non-profit world.[33]

For example, one female board member, who discussed her own efforts to be prepared for meetings and to take director education courses designed to help her perform better as a director, noted that two other women on the board, both with backgrounds in academia, were either not capable of contributing or did not make the effort to educate themselves enough to contribute to the board discussion:

> A: There's two women, now there's four, but there's only two women, they made comments that didn't even make sense. They didn't show that they knew what they were doing. Well, as soon as you do that, that's just like—you know, you're dead meat. It's that way as a corporate officer, too, if you're making comments that don't seem relevant or like you really

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[32]. Transcript No. DS300017, p. 8, Oct. 9, 2007.

[33]. Historically, female and minority directors disproportionately have been drawn from non-profits and academia, although that trend appears to have changed with respect to female directors. *See* BRANSON, *supra* note 2, at 91, 103 (reporting that women directors who are Vice Presidents, Chief Operating Officers, Chief Financial Officers, or Chief Executive Officers of a corporate subsidiary have increased their share of the female board seats from 18.3% in 2001 to 32.7% in 2005, while the percentage of women directors coming from academia, nonprofits, and former government service declined from 37.2% of female directors in 2001 to 29% of female directors in 2005).

> get it. I prefer to be quiet and not just chatter and prove the point. (Chuckle)[34]

Similarly, a white male respondent told us that the female board member who was already on the board when he joined was weak, although the company later appointed an African-American woman to the board who was a very valuable board member:

> [The first female director] I thought was fairly weak. Not a strong member. I think—and this is just my conjecture—I think when she was picked or brought on the board I think they picked her for diversity reasons not for strengthening the board which I'm totally against, but I realize why it happened. When [the second female director] came on she was picked for strength.[35]

Our CEO respondents confirm this conscious effort by at least some public companies to add female and minority members to the board. For example, as stated by one corporate CEO with a highly diverse board (as compared to the Fortune 500 average):

> I think there was some intention in the diversity of the board, and I guess I would call diversity a secondary but not irrelevant consideration in this sense. We obviously want people on our board that are very high in terms of personal character, we want people that have good business judgment, and those characteristics come first, by far. But we have tried to, in a context, have people with what I call some different sets of perspectives. We want their fundamental perspective, of course, to reflect the shareholders, but also the people we have on our board tend to be the kind of people that, in addition to being shareholders, also look like our client base.[36]

And later:

> In one or two cases, where there was a tie, frankly, we encouraged them to look at a female director, or they said, "We got a really good female and we got a really good male." I said, "Well, other things being equal, if they're both really good, we'd rather have a female."[37]

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[34]. Transcript No. DS300009, p. 7, July 30, 2007.
[35]. Transcript No. DS300014, p. 6, Aug. 30, 2007.
[36]. Transcript No. DS300025, p. 1, Dec. 5, 2007.
[37]. Transcript No. DS300025, p. 8, Dec. 5, 2007.

B. *Why Diversity?*

Given the purposefulness with which many public companies have sought to add gender and racial diversity to the board, one naturally should ask, as many researchers have, why? What do corporations hope to accomplish through these diversity efforts? Of the numerous rationales offered for board diversity by researchers, do any hold resonance with corporate boards and CEOs? Are there other potential rationales supporting corporate board diversity not addressed in the literature?

Elsewhere, we discuss at length the rationales for board diversity offered by our respondents and situate those rationales within existing theoretical and empirical debates on board diversity.[38] Those rationales include theories that board diversity addresses fairness concerns; that firms seeking board diversity are accessing an untapped talent pool; that female and minority board members reduce agency costs; that a more diverse board possesses more and better information; that diverse boards are more likely to engage in constructive dissent; that a diverse board conveys a credible signal to relevant observers of corporate behavior; and that board diversity is a meaningless public relations maneuver, generating neither real costs nor real benefits for shareholders.[39]

We note that our respondents propose some board diversity rationales not previously addressed in the literature, suggesting that academic researchers have not yet fully exhausted the myriad of reasons that public companies may seek to diversify their boards.[40] At this point, we also find very little support from our respondents for some prominent board diversity rationales, such as the theory that board diversity may alter

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[38]. *See* Broome, Conley & Krawiec, *supra* note 9.
[39]. *Id.* (discussing these theories at length).
[40]. *Id.*

board decision-making processes.[41] Here, however, we limit our discussion to the rationale for board diversity that figured most prominently in discussions with our initial sample of respondents: signaling theory.

C. Signaling Through Board Diversity

1. Signaling Generally

Signaling theory, which examines the nature of communication, is relevant to researchers in a wide range of fields, including: biology, economics, sociology, anthropology, political science, linguistics, and psychology. Based on the notion of asymmetric information, signaling theory asks the question of how the signal sender can credibly convey relevant information to the signal receiver. For example, gazelles may leap repeatedly in the air at the sign of a predator in an attempt to demonstrate their strength and speed (known as "stotting").[42] Humans may engage in conspicuous displays of consumption, to signal wealth and status,[43] or may educate themselves in order to signal productivity.[44]

Similarly, corporations may add gender, ethnic, or racial diversity to their boards of directors in an attempt to signal some information to relevant observers of corporate

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[41]. *Id.*

[42]. *See*, Nadav Nur & Oren Hasson, *Phenotypic Plasticity And The Handicap Principle*, 110 J. THEORETICAL BIOLOGY 275 (1984) (discussing stotting in gazelles and roaring among stags as signals from prey to predators); Fernando Vega-Redondo & Oren Hasson, *A Game Theoretic Model Of Predator–Prey Signaling*, 162 J. THEORETICAL BIOLOGY 309 (1993) (developing a model of strategic predator-prey interaction); Shigeo Yachi, *How Can Honest Signalling Evolve? The Role of the Handicap Principle*, 262 PROC.: BIOLOGICAL SCIENCES 283 (1995) (examining the conditions for the evolution and maintenance of honest signaling and elucidating the role of the handicap principle).

[43]. *See* THORSTEIN VEBLEN, THEORY OF THE LEISURE CLASS (1899) (arguing that individuals signal wealth through leisure and conspicuous consumption).

[44]. Michael Spence, *Job Market Signaling*, 87 Q. J. ECON. 355 (1973) (demonstrating that, because unproductive job applicants face higher opportunity costs than productive applicants in terms of the time and effort invested in education, education serves as a credible signal to employers of prospective employees' likely productivity levels).

behavior. For instance, a diverse board may meaningfully convey otherwise unobservable information to the public, corporate constituencies, interest groups, or regulatory authorities.

We consider our discussions with respondents about the potential signaling function of board diversity especially fruitful, as signaling theories of board diversity face several hurdles that as yet have been insufficiently explored in the literature. For example, some researchers have questioned the extent to which relevant corporate constituencies are aware of board composition.[45] In the absence of such awareness, board diversity could convey nothing of relevance to interest groups whose perceptions have the power to influence corporate performance.

Moreover, because credible signals must typically be prohibitively costly for senders lacking the relevant quality to fake, it is not clear that signaling is a plausible explanation for board diversity under all of the conditions in which it is cited as a rationale, either by our respondents or by commentators. The signaling rationale for board diversity is a particularly difficult one to evaluate because of the lack of an inherent connection between the signal—the presence of women and minorities on the board—and the quality of interest to the signal receiver. Typically, those qualities are equal opportunity in the workplace, attention to the needs of women and minorities in product and service development and provision, or that the firm is "progressive" or "forward-looking" in some other meaningful way (hereafter, "good firms").[46]

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[45]. *See* Fairfax, *The Bottom Line*, *supra* note 2, at 830 (noting that, "[b]ecause board members do not normally interact with company employees, employees may be unaware of the composition of their company's board").

[46]. *See infra* notes 54-69 and accompanying text (discussing each of these signals in more detail).

Some signals permit an assessment of the quality they represent simply through observation (assessment signals), and are considered inherently reliable because (1) they are costly to produce, and (2) that cost is directly related to the unobserved trait being broadcast. A gazelle's stotting aptly illustrates this principle. The gazelle's stotting credibly signals strength to predators, because the signal is prohibitively costly for a gazelle lacking strength to send. A weak gazelle would either be unable to send the signal, or would be wiser to reserve her energy stores for outrunning her predator.[47]

Similarly, under certain conditions, a job applicant's level of education allows a prospective employer to directly assess productivity, because only those who are productive could have invested the necessary time and effort to achieve that level of education.[48] In both examples, observation of the signal permits reliable assessment of the unobserved trait. The gazelle's leap allows the predator to reliably observe strength, because jumping requires a costly expenditure of strength. The job candidate's education allows an employer to reliably observe productivity, because educating oneself requires a costly expenditure of productivity.

Conventional signals, by contrast, are less reliable because they lack an inherent connection between the signal and the quality that they represent. Instead, their content derives from convention rather than through direct assessment. In the absence of external mechanisms, such as punishment for cheaters, recipients of conventional signals should have less confidence in their reliability.[49]

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[47]. *See* Nur & Hasson, *supra* note 42, at 277.
[48]. *See* Spence, *supra* note 44, at 355-58.
[49]. When signals are not inherently reliable some social or other effective mechanism for punishing cheaters must ensure their reliability. *See* Eric A. Posner, LAW & SOCIAL NORMS (2000); Eric A. Posner, *Symbols, Signals, and Social Norms in Politics and the Law*, 27 J. LEGAL STUD. 765 (1998). Because we discern no disciplining mechanism with respect to the use of board diversity as a signal, we do not discuss this possibility further.

The wearing of eccentric, offbeat clothing, for example, is often taken as a sign that the wearer possesses certain personal traits, such as that she is original or a free thinker. Yet, because dress is not inherently connected to independence of mind or spirit, a signal sender who desires to convince the receiver that she is original and free thinking could fake the signal. In other words, a dull and conventional thinker, aware that a signal receiver desires to hire an original, free-thinking employee, may be able to fool a prospective employer through her apparel into believing that she is such a person. To be sure, it may be more costly for a dull and uncreative person than for an original and free thinking person to wear eccentric clothing and, indeed, on average we may observe more free thinkers than conventional thinkers wearing eccentric clothing (presumably, this is how the convention arose to begin with). But if the benefits of mimicry are high enough and the costs are low enough (in other words, when "talk is cheap"), rational signal senders should be expected to attempt such deception, so long as the benefits to the sender outweigh the costs. Under such conditions, the signal loses meaning. For these reasons, conventional signals can be unstable. If deception becomes too common, a once significant signal can become meaningless.[50]

Boards of directors are in some ways a rather distant device through which to signal the asserted qualities of interest to signal recipients.[51] To illustrate, adding female and minority partners to a law firm or female and minority members to a corporation's senior management team are considered credible signals of the absence of a glass ceiling,

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[50]. Judith S. Donath, *Identity and Deception in the Virtual Community*, *in* COMMUNITIES IN CYBERSPACE 32-33 (Marc A. Smith & Peter Kollock eds., 1999).

[51]. Indeed, researchers have sought to analyze the impact of numerous board characteristics on firm performance, with conflicting results. *See, e.g.*, Sanjai Bhagat et al., *The Promise and Peril of Corporate Governance Indices* (European Corp. Governance Inst., Working Paper No. 89, 2007), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1019921 (summarizing the literature on this point).

because observation of the signal permits a direct assessment of the quality of interest to the signal receiver—the probability of promotion for women and minorities to partner or senior management. The addition of female or minority *board* members does not permit a direct assessment in the same way. Female and minority board members are typically drawn from outside the corporation and, because board membership is a position entirely separate from other positions within the firm, the willingness of a firm to add female and minority board members need not necessarily indicate anything about the opportunities of women and minorities seeking promotion within the firm. In other words, we must be able to assure ourselves that "talk"—through the demographic composition of the board—is not cheap, but instead is sufficiently costly to bad firms that they do not attempt to mimic good firms.

Certainly, one can imagine perfectly plausible scenarios under which board diversification would be more costly for bad firms than for good firms. For example, the management and other directors of bad firms could consider female directors less qualified and more troublesome than white male directors, while management and directors at good firms do not. In that case, then, the psychic costs to bad firms of adding female directors would be higher than in a good firm.

Similarly, employees, consumers, and other corporate constituents may have sorted themselves among good and bad firms such that the constituents of bad firms do not want the firm to embrace workplace diversity and, in fact, would exit or otherwise penalize a firm that signaled such an intention.[52] If this is the case, then bad firms face

[52]. *See, e.g.*, RICHARD A. EPSTEIN, FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS 66-69 (1992). Alternatively, one can also imagine plausible scenarios in which board diversity is equally costly to all firms, but in which progressive firms reap greater benefits from the board diversity signal than do non-progressive firms. If this is the case then, once again, board diversity

great costs to signaling through board diversity. Because these costs are not shared by good firms, signal recipients can expect the signal of board diversity to remain credible.

The point here, however, is that one can also easily imagine plausible scenarios in which the costs of board diversity to a bad firm do not exceed those borne by good firms. For example, the management of a bad corporation may view the board primarily as a public relations ornament, neither adding nor detracting much from the firm's operations. Such a corporation may easily diversify the board—after all, it is a meaningless organization anyway—while resisting equal employment practices within the firm and diversity efforts within management. In such a case, bad firms may mimic good ones by diversifying the board and reaping the benefits. Such a situation is unstable: over time, signal receivers lose confidence in the signal and stop listening to it. The possibility of such mimicry is especially salient today, as researchers increasingly document evidence of corporations attempting to demonstrate their good nature through similar signaling measures.[53]

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could act as a credible signal of a firm's good nature. These costs could arise if, for example, female and minority directors were less experienced than their white male counterparts, brought less status and prestige than white male directors to the boards on which they sit, or if recruiting and retaining women and minority directors was more difficult.

[53]. *See, e.g.*, John M. Conley & Cynthia A. Williams, *Engage, Embed, And Embellish: Theory Versus Practice in the Corporate Social Responsibility Movement*, 31 J. CORP. L. 1, 14-15 (2005) (noting that, "the very existence of a coherent CSR movement may invite insincerity," because a "company could learn the culturally appropriate behaviors and participate in the CSR discourse without significantly changing their real world behavior"); Oona A. Hathaway , *The New Empiricism in Human Rights: Insights and Implications*, 98 AM. SOC'Y INT'L L. PROC. 206, 209 (2004) (stating that "the states with the best human rights practices (and hence the best reputations) are often more reluctant to join human rights treaties than those with worse practices (and hence worse reputations)," suggesting "that states with better practices have little to gain and something to lose by joining the treaties, whereas the opposite is true of states with poor practices"); Oona A. Hathaway, *The Cost of Commitment*, 55 STAN. L. REV. 1821 (2003) (presenting evidence that states with poor human rights records will sometimes commit to human rights treaties, when the probability of compliance is low); Michael J. Lenox & Jennifer Nash, *Industry Self-Regulation and Adverse Selection: A Comparison Across Four Trade Association Programs*, 12 BUS. STRATEGY & ENV'T 343 (2003) (presenting evidence that, in the absence of measuring and enforcement mechanisms for compliance, poorer performing firms will seek to join industry trade associations in an attempt to gain the signaling and other benefits of membership); Andrew A. King & Michael J. Lenox, *Industry Self-*

Lastly, the signaling rationale is further complicated by theories suggesting that board diversity provides other tangible benefits to the corporation, such as improved board functioning or the ability to better serve the needs of product and labor markets. If board diversity provides net benefits, then the signal is not costly to send or to fake, undermining its credibility as a signal of firm progressiveness. Thus, it is not clear to us that signaling is consistent with those theories of board diversity suggesting net benefits from racial and gender board diversity.

To be clear, we do not dismiss signaling out of hand as a potential rationale for board diversity. Because we do not know the distribution of costs and benefits of board diversity in good firms versus bad firms, however, we approach blanket assertions of the signaling benefits of board diversity with caution.

We thus explore in Part III B.2. below the conditions under which we believe signaling through board diversity is most likely to be successful, and relate in that part the most credible – and instructive – signaling story offered by our respondents. In that case, a corporation facing a public relations crisis selected an especially costly minority director, perhaps as a signal of a commitment to changing marketing practices. This story, combined with our analysis, however, conveys an important lesson about the signaling rationale for board diversity: The rationale is at its strongest under particular conditions that may not exist in all corporations at all times.

2. Three Signaling Scenarios

In this section, we discuss the three most common signaling scenarios garnered from existing research and our own respondents. First, firms may attempt to employ

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Regulation Without Sanctions: The Chemical Industry's Responsible Care Program, 43 ACAD. MGMT. J. 698 (2000) (presenting evidence of adverse selection in the membership of Responsible Care).

board diversity as a signal that the firm embraces equality in employment, a signal most often relevant to employees. Second, firms may attempt to employ board diversity as a signal that the firm has considered the needs of certain demographic groups in product development and service, a signal most often relevant to consumers. Finally, firms may attempt to employ board diversity as a signal that the firm is forward-looking or socially responsible in some way, a signal most often relevant to regulators, the public, or other interest groups.[54]

a. Signaling Workplace Equality

Firms may attempt to employ board diversity as a signal that the firm embraces equality in employment and has removed the glass ceiling and the last vestiges of discrimination. Although this signal is most frequently cited as directed at labor, other corporate constituencies could also care about the firm's employment practices, yet find it costly to observe such practices directly.

Respondents frequently articulated the view that the presence of women and minorities on the board sent an important, positive signal to labor. In contrast to their reactions to questions regarding signaling to consumers,[55] most respondents addressed questions regarding employee signaling with a high level of specificity. Some respondents related personal anecdotes relevant both to employee awareness of board composition, and to the impact of board diversity on employee perceptions. For example, one respondent noted:

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[54]. We understand that there may be overlap in the intended audience for each of these signals. For example, consumers and employees may also care about the firm's level of social responsibility. Nonetheless, for the sake of simplicity, we have organized the signaling scenarios in this section along the lines most frequently articulated by our respondents and other researchers.

[55]. *See infra* notes 62-66 and accompanying text.

> And so I think they felt bad that they didn't have a woman on the board and they felt the woman could add value but be a statement to employees.
>
> And that was kind of interesting, at least from my perspective. I had not thought about that a whole lot, but I went to the first board meeting at [Company X] and the receptionist greeted me after I introduced who I was. She greeted me and she said, "[W]e're so happy to have a female on the board," and I thought that was interesting for a receptionist to say that. And then I ran into someone in the neighborhood I did not know worked at [Company X]. And it was a female and she said, "[O]h, I'm so glad we have a female on the board." So, it was something that I think the employees recognized and liked.[56]

Other respondents cite the desire to send a positive signal to constituencies as a motivating factor behind diversity on their board, but acknowledge that they are unsure whether the signal is heard by the intended audience. As stated by one respondent:

> Q1: . . . [Y]ou mentioned that they believe that diversity enhances shareholder value; is there a particular way it does that?
>
> A: Well it does that because you are attracting the best people and if you show that you are open to people of whatever color or whatever.

And later, following a statement by the respondent that board composition was important to the perceptions of customers and employees:

> Q: Do you think the composition of your board sends an important message to the employees and customers of the bank?
>
> A: I hope it does. You know I never know that. You know I never know who notices those things. Whether it's just a little clan of people in Washington writing ugly letters about the board or whether it's the real thing in the world. I don't have any idea whether that's true or not but I hope it does. It's supposed to. It's supposed to show something.[57]

Although the extent to which employees are aware of board composition is ultimately a question best answered by employees themselves, rather than by board

[56]. Transcript No. DS300010, p.3, July 30, 2007.
[57]. Transcript No. DS300007, p. 24, July 27, 2007.

members, we note two recurring themes from our respondents regarding the question of whether employees are aware of board composition. First, senior managers—who regularly interact with the board—seem to constitute a key labor group in the eyes of board members and CEOs who cite signaling rationales for board diversity. Respondents cite the need to avoid the perception of a glass ceiling at the firm as an important factor in recruiting and retaining women and minorities in management, an area in which many firms have struggled and on which many have spent significant resources.[58]

For example, one female respondent discussed the importance of board diversity as a symbolic statement to minority and female executives, noting the impact of such statements on her when she was an employee:

> Q: Do you think it's important to the women and minority senior executives that there be diversity on the board?
>
> A: Yeah, I think so; it was important to me when I was an employee. I think this is more recognition that, you know, people, that women or minorities are competent, capable and can be in leadership positions, to give you a sense of pride, and a little bit of comfort.[59]

Second, we note that firms with female and minority directors appear to take affirmative steps to inform their broader employee base of board composition and to create opportunities for exposure to such directors. Those steps include site visits by board members to observe operations and meet employees; the featuring of individual directors in employee training videos, brochures, and other mailings that highlight

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[58]. See, Alexandra Kalev, Frank Dobbin, and Erin Kelly, *Best Practices or Best Guesses? Diversity Management and the Remediation of Inequality*, 71 AM. SOCIOLOGICAL REV. 589 (2006) (examining the effects of seven common diversity programs on the representation of various demographic groups in management at a sample of 708 firms, and reporting varying rates of effectiveness, depending on the type of program);. Frank Dobbin, Alexandra Kalev, and Erin Kelly, *Diversity Management in Corporate America*, 6(4) CONTEXTS 21-28 (2007) (discussing the large sums spent on diversity measures, some of which may be ineffective).

[59]. Transcript No. DS300029, p.12, Dec. 17, 2007.

directors either individually or as a group; and interaction with employees at functions attended by employees and individual directors.

These efforts (and their possible limitations) are highlighted by an exchange with a CEO respondent. The following exchange followed a statement by the respondent that board diversity sent an important message to employees:

> Q: Do you think the board composition, with having four women on it, is as important to the sort of executive level females as it is to the rank and file - the 75%?
>
> A: You'd really have to ask them. I do think symbolically it has some importance, but I don't know, you know, I don't know how much it matters to them.
>
> Q: Are the lower level employees aware of the composition of the board?
>
> A: They get that information, how much attention they pay I couldn't say.
>
> Q: But you make sure they're exposed to it?
>
> A: Yeah, they would know that. They would know that. I was trying to think about it. We have a lot of entry-level jobs that you have a much more higher level of turnover, and I would guess at that level people don't pay much attention. I would say it's more the entry-level management and above where people really hear those signals, and how important they are, I don't know how to judge. (Chuckle)
>
> Q: I asked because it's one of the questions that people ask me. When I go talk about boards of directors people frequently ask me, "Well, how much do the employees know about what the board - the composition of the board is?" and so I was interested to hear your perspective on whether efforts are made, whether in your experience there's --
>
> A: They would know, because we feature, over time, all of our board of directors, now it's one at a time, in our videos that goes to all the employees, so they would know. How important it is, I don't know. I would think at a management level there is some symbolism, I would guess. I'm speculating, obviously.[60]

[60]. Transcript No. DS300025, p. 5, Dec. 5, 2007.

Far from feeling that this potentially symbolic role of female and minority directors contributed to a feeling of "tokenism," some minority and female respondents expressed a desire to act as a symbolic conduit between the board and the employees, and at least some seemed to take pleasure from the thought that women or minority employees might view them as a representative of sorts on the board. For example, one female director related a story of her interactions (at management's request) with employees at the firm, a substantial majority of who are female:

> A: In fact today the last speaker [at a program the director had just attended] I made notes, the bank had asked me at one point to speak to the women in the bank and you kind of take notes just as you live your life with important things that might be pertinent for that and today there was so much that was spoken about that I thought oh I could share this with the women at the [bank] and it would be something that would inspire them and encourage them and help them know that they are appreciated and that they are the bank and just that so much of the tone can come from that part and if they're happy and appreciated then they; it just, there just is a wonderful ripple effect from that. So anyway, I'm sure that maybe is a part of why I'm there [on the board].
>
> Q: So who asked you to speak to the women employees?
>
> A: [respondent names two female executives]
>
> Q: And they're officers at the bank?
>
> A: They are.
> . . .
>
> Q: Just to follow up on that do you think it helps them to see a woman on the board?
>
> Q1: That's what I was going to ask too.
>
> A: I do. I do and I think they feel connected to that woman. I mean I think I'm approachable and I care about them and they know that and I don't think they'd hesitate to; you know I'll ask them is there anything I need to take to the board. I don't just ask the women. I ask the men that too. But

> anyway I try to touch those who have been put in my sphere of influence so far as being a conduit to the board.[61]

2. Signaling About Product Markets

Firms may attempt to employ board diversity as a signal that the firm has considered the needs of certain demographic groups in product development and service. Although consumers are most frequently cited as intended receivers of such a message, other corporate constituencies may have an interest in such a signal as well. Indeed, one of our most interesting purported signaling stories involves public and interest groups' perceptions related to product markets.

Research on board diversity frequently considers consumers a relevant target audience of board diversity signals, and some respondents did cite "looking like your customers" as a motivating diversity rationale on their boards. Overall, however, respondents failed to provide concrete consumer signaling stories or specific examples demonstrating consumer awareness (or steps taken by the corporation to enhance consumer awareness) of board composition. Indeed, when pressed, most conceded that they were not sure of the impact, if any, of board diversity on consumer relations, and focused instead on mechanisms by which diverse board members had improved the corporation's ability to serve its customer base—i.e., a board information and expertise rationale, rather than a signaling rationale.[62]

An exchange with one female respondent aptly demonstrates this point, as well as the contrast in the specificity with which respondents fielded follow-up questions

[61]. Transcript No. DS300015/DS300016, pp. 6-7, Sept. 21, 2007.
[62]. *See* Broome, Conley & Krawiec, *supra* note 9 (discussing this rationale).

regarding signaling to employees versus signaling to consumers or the general public.[63] When asked how she would make the case for board diversity to a fellow board member who was skeptical, she responded:

> Now so this guy would say, "well we're making [widgets]. How can a black man on this board make a [widget] better?" Well because ultimately the people who are making the [widgets] on the floor will see that we care about what they think and we care about what they say and if we can be representative, if we can have a board that looks like the people that work with us, that do all the work -- frankly, we show up six times a year and are smart but we're not doing the work -- and if we can look like the people who are buying our products, it will show that we respect them and they will either work harder for us and say, "yup those people respect my opinion because look they have an African American on the board and I believe he speaks for me because I'm an African American" or "they have women on that board" or "they have a Chinese person on that board" and our public will look at us and say "they're dedicated to making sure that all voices are heard at that company. The price is the same, but company X doesn't have any women or any people of color. I'm going to buy from this company because they are showing that they respect global vision and they respect a lot of people's voices," and that's what I would say to this man.
>
> Q1: How much awareness do you think employees and customers and the general public have about the demographic composition of the board?
>
> F: I think the customers have a lot. I mean sorry, I think our employees have a lot because a lot of the employees are shareholders and most of the employees -- all of the employees, probably -- are shareholders. Very few aren't. Maybe that's a better way to put it. As for customers, who knows how many of them actually go to the website and see. I get letters, we all get letters from shareholders. I don't think I've ever gotten a letter from a customer but it might just be that they filter them before I would get them but- -
>
> Q1: So the employees would have seen, for example, pictures of the board- -
>
> F: Right.
>
> Q1: In their shareholder materials?

[63] *See supra* notes 55-61 and accompanying text (discussing the different manner used by respondents to discuss signaling to employees versus signaling to consumers).

> F: Right.
> . . .
>
> Q1: And what about customers and the public?
>
> F: You know I don't know the answer to that question. It's not that I don't want to answer it. I just don't know. I would still make the case to this recalcitrant board member, however, if he were to say we don't make the [widgets]. I would say well the tone at the top actually does make the [widgets] and if the tone at the very top respects diversity then the [widgets] will be better and I believe that. I don't know that you can quantify it. This widget is that much better than a widget without a diverse board but I believe it in my heart.[64]

From our initial sample of respondents, however, we garnered one story of product market signaling that ran counter to this trend. Although the story involved the perceptions of both the public and interest groups, we tell it here as a consumer signaling story, because it also involved the threat of product boycotts:

> Q2: When there was this talk of diversifying, were there reasons articulated for why it was important? So, for example, companies were receiving pressure from government and interest groups?
>
> A: Well, I think with [Company A], they had a real concern about building relationships with minority groups, with efforts to try to sell [the product]. And I think they feared that it was crucial to maintain a good relationship with minority groups, if they were going to be able to succeed with efforts to sell the products. . . . And they also felt that a lot of minorities in the U.S. were buying their product, and might turn if they didn't have diversity on the board.
>
> Q: And not necessarily because the average black consumer would be looking at the annual report to see who the board members were, but because the NAACP, or one of these interest groups would be suggesting, "This is an all-white board, you ought to boycott these products?"
>
> A: Yeah, yeah, right.
>
> Q2: I see. So it was mainly the concern for non-consumer interest groups and their influence over consumers? In other words, how did they think

[64] Transcript No. DS300050, pp. 19-20, Oct. 3, 2008.

> that having some diversity on the board then might help them in their mission to not alienate African-American consumers?
>
> A: They were worried about lawsuits. They didn't want particularly national lawsuits alleging that they discriminated. They didn't want community groups or national organizations going around talking about their lack of diversity, in the staff, and on the board, and other things. And so they made an effort to try to diversify, in that respect, to eliminate that potential complaint.
>
> Q2: And in following up on Lissa's question, what was their fear of how consumers would be aware?
>
> A: At the time, we had activists who were singling out organizations that had not [diversified the board and] the staff, and they didn't mind raising those issues nationally. Or, they did raise them nationally. So, it was pretty clear that these groups were raising these issues now, and were posing some real problems for the corporation. . . . [B]ut there was some concern raised about that, and whether the product that these companies were selling were really helpful or harmful to minority groups. And if they were harmful, whether there was a sympathetic ear on the board or in the administration of the company, to help minority groups raise the issue and get some kind of redress.
>
> And the companies, in my opinion, viewed that this kind of pressure was out there, and they were trying to do what they could to respond to it.[65]

We find this respondent's story especially instructive as a potential signaling example because the respondent, a lawyer who had sued the company on several occasions, was in some ways an especially costly diversity choice. In other words, the company could have appointed a less activist African-American to the board. Although, from the firm's perspective, the selection of our respondent may also have been an attempt to bring the proverbial camel inside the tent, our respondent indicated that the selection of a more palatable minority director would not have been considered a credible signal:

[65]. Transcript No. DS00034, pp. 4-5, Feb. 5, 2008.

> Q2: It's interesting. It's as if they affirmatively sought out somebody who would come on [the board] and ask these questions. Sort of interesting you know?
>
> A: But I think they had to. It meant, at the time, they were fighting a problem with whether you were going to regulate [the product], the impact of legislation or other efforts to reduce the sale of [the product], or use of [the product], and those were real threats about the continued operation of the business. And they really had to reach out to other groups to get something. And I don't know that they did enough with the Hispanics or other minority groups. I know they reached out to African-Americans because they were readily identifiable, and they did it. But I think it's understandable that they would try to do that, because they really had some pressure.
>
> Q2: You know, you were very much a known quantity because you had been suing them. One might think that they could have been tempted to seek out an African-American who would not raise those questions.
>
> A: Less controversial.
>
> Q2: Yeah, exactly. So I wondered if you thought about what their motivation was for you in particular?
>
> A: Well, no. But, one, they could have looked at somebody less controversial, probably, and in some instances they did, in the [inaudible 26:53]. But I think when they asked some friends around town who to add, they were given a name. And it would have been perhaps more of a problem to ignore the suggestion --
>
> Q2: Right, I understand.
>
> A: -- than run the risk of putting somebody on the board, and keeping them happy, whatever. So anyway, they did, and they survived. Well, I can't say they survived. They lost business and they really had to branch out.[66]

3. Signaling Progressiveness

Firms may attempt to employ board diversity as a signal that the firm is forward-looking or socially responsible in some way, a signal most often relevant to regulators,

[66]. Transcript No. DS00034, p 9, Feb. 5, 2008.

the public, or other interest groups, but one that could also be heard by consumers or labor.[67] As stated by one respondent:

> Q: You mentioned a few minutes ago signaling something, in terms of compliance, with diversity. I think maybe you were referring to when you were at [Company A]. Could you elaborate on that?
>
> A: We were doing a lot of acquisitions, which require approval, regulatory approval, which bring your Community Reinvestment Act compliance up. And having a diverse board isn't required by the Community Reinvestment Act, but it suggests that you have actually thought over serving the needs of everybody in the community. And I mean that as a signal. It would show an attitude. Who your board is shows you who you think your community is, who your markets are. It does, it's symbolic speech.[68]

And later:

> To me, that's why some boards go for diversity in part, they want to look like they're the majors, I'm sure they want to look like world businesses, they want to look like businesses that understand the galaxy. Well, I'm serious. And so, yeah, I think a piece of it is symbolic speech. That used to make me ill when people would say, "Well you want to look like your community." But in truth, you do. Or the community you want to be. Better yet than that, you want to look like the community you *aspire* to be.[69]

IV. CONCLUSION

Academic and public interest in board diversity has grown in recent years and female and minority representation on boards—while still far below their numbers in the population and the workforce—has grown along with it. Although researchers have begun to turn their attention to the question of why corporations may seek to diversify their boards, few have attempted the inquiry into how well such theories and evidence

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[67]. We note that, so far as we could tell, this asserted signal did not break down into democratic versus republican or liberal versus conservative. Instead, the concept seemed to be invoked as a means of demonstrating that the firm was law abiding and conformed to broadly held societal norms. In other words, the asserted signal seemed to be, "we're not Enron," rather than "we're the Body Shop."
[68]. Transcript DS00033, p. 21, Feb. 5, 2008.
[69]. Transcript DS00033, p. 22, Feb. 5, 2008.

match up with the rationales and experiences articulated by those most directly involved in the board diversification process—corporate directors and CEOs.

This Article represents a modest first step in that direction. Consistent with existing quantitative evidence, corporate directors and executives confirm purposeful attempts at board diversification by many corporations. Furthermore, they echo the refrain of many researchers and board diversity advocates that signaling is a potential benefit to be gained from board diversity.

Signaling is a complicated theory, however, and particularly so in the context of board diversity. In the absence of effective mechanisms for punishing mimicry, we must be able to assure ourselves that "talk," through the demographic composition of the board, is sufficiently costly to deter mimics who seek to reap the signaling benefits of board diversity without incurring the costs of altered corporate behavior. Because we do not know the distribution of costs and benefits of board diversity across firms, we must approach blanket assertions of the signaling benefits of board diversity with caution, and thus are unable to conclude that the signal is not being mimicked.

Moreover, proponents of a signaling justification for board diversity must demonstrate that board diversity is sufficiently costly and visible, as compared to other potential signaling mechanisms available to firms, such as affirmative action programs, community service, advertising campaigns, and the like. Although it seems that board diversity might fare poorly compared to such competing signaling mechanisms, it is difficult to say with any certainty. Perhaps board diversity is a signal directed primarily at elites, government officials, or business networks, and these constituencies are more

likely to observe board composition and estimate its costs as a signal than is the case with alternative signals.

Although more research is needed to fully evaluate the viability of the signaling rationale for board diversity, we note in closing one piece of evidence casting doubt on the value and credibility of board diversity as a signal, at least as that signal relates to equality of workplace opportunity. Every year, Black Enterprise Magazine identifies the "Forty Best Companies for Diversity," including sub-lists of the best companies for board diversity, supplier diversity, workforce diversity, and senior management diversity.[70] The annual unveiling of these lists typically generates substantial media attention and nearly every company on the list expends considerable effort publicizing this accomplishment.[71]

One might expect that, if board diversity is a signal for broader workplace opportunities, then the same firms that appear on the "Best in Board Diversity" sub-list should also appear with some regularity on the other lists. In fact, however, there is very little overlap between the lists of the best companies for board diversity and any of the

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[70] *The Fifteen Best Companies for Board Diversity*, BLACK ENTERPRISE (July 11, 2008), *available at* http://www.blackenterprise.com/diversity/diversity-lists/2008/07/11/the-15-best-companies-for-board-diversity-2/). The Black Enterprise list of most diverse boards differs from that produced by the Alliance for Board Diversity, presumably because the ABD list includes white females in its diversity measure and is limited to the Fortune 100, whereas the Black Enterprise list extends to the 1000 top publicly traded companies and is limited to board representation by African-Americans and other ethnic minority groups. ABD, *supra* note 26 at 7 (listing the twelve Fortune 100 companies with more than 40% board diversity). Not surprisingly, there is even less overlap between the ABD board diversity list and the Black Enterprise sub-lists for workplace diversity, senior management diversity, and supplier diversity.

[71] See, e.g., *Black Enterprise Magazine Names Verizon to Publication's List of 40 Best Companies*, Reuters (Jun 30, 2008) (press release regarding Verizon's naming to list), available at http://www.reuters.com/article/pressRelease/idUS164791+30-Jun-2008+PRN20080630; *Black Enterprise Names Xerox Among the Best for Diversity* (June 12, 2007) (press release regarding Xerox's naming to list), available at http://www.xerox.com/go/xrx/template/inv_rel_newsroom.jsp?ed_name=NR_2007June12_BlackEnterpriseMag_Diversity&app=Newsroom&view=newsrelease&format=article&Xcntry=USA&Xlang=en_US; *UPS Named a Top Company for Diversity; Black Enterprise Magazine Releases 'The 40 Best Companies for Diversity'* (June 14, 2006) (press release regarding UPS's naming to list), available at http://www.csrwire.com/News/5778.html.

other lists. For example, only four of the companies on the "Fifteen Best in Board Diversity" sub-list are also represented on the "Fifteen Best in Senior Management" sub-list.[72] Similarly, only three companies from each of the "Fifteen Best in Workforce Diversity," and the "Fifteen Best in Supplier Diversity" are also on the "Fifteen Best in Board Diversity" list.[73]

This mismatch, of course, does not necessarily eliminate signaling about workplace equality as a rationale for board diversity. Indeed, many factors could explain the apparent inconsistency, including Black Enterprise's measurement methodology, or a lag time between signal sending (through board diversification) and significant workforce changes. Such evidence, therefore, merely reinforces our previously noted caution regarding signaling through board diversity.

To be clear, signaling is only one of many reasons that firms may seek to diversify their boards, including fairness concerns that are wholly unrelated to corporate performance. Our caution regarding the signaling rationale for board diversity implies nothing about the relative strengths or weaknesses of these other potential board diversity motivations.

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[72] *Compare, The Fifteen Best Companies for Board Diversity*, *supra* note 70, *with The Fifteen Best Companies for Senior Management,* Black Enterprise (July 3, 2008), *available at* http://www.blackenterprise.com/diversity/diversity-lists/2008/07/03/the-15-best-companies-for-senior-management/.

[73] *Compare, The Fifteen Best Companies for Board Diversity*, *supra* note 70, *with The Fifteen Best Companies for Workforce Diversity,* Black Enterprise (July 3, 2008), *available at* http://www.blackenterprise.com/diversity/diversity-lists/2008/07/10/the-15-best-companies-for-workforce-diversity-2/; *and The Fifteen Best Companies for Supplier Diversity,* Black Enterprise (July 3, 2008), available at http://www.blackenterprise.com/diversity/diversity-lists/2008/07/09/the-15-best-companies-for-supplier-diversity-2/.

Figure 1

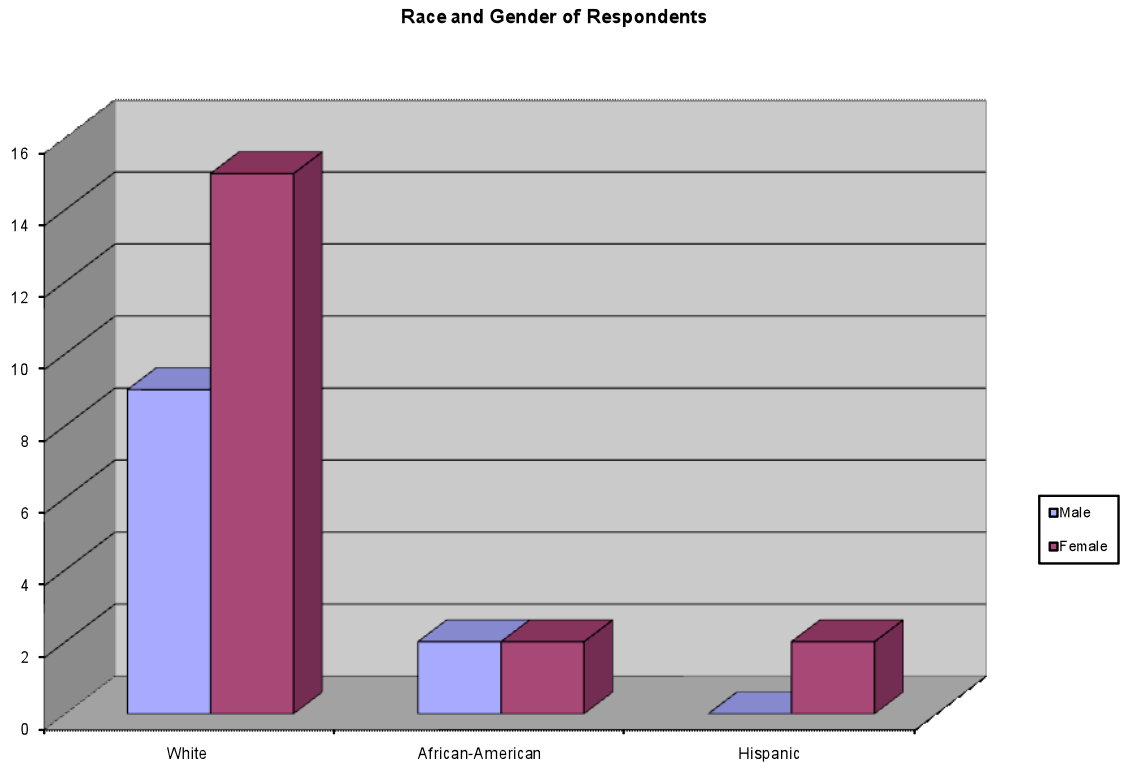

Race and Gender of Respondents
16
14
12
10
8
6
4
2
0
White
African-American
Hispanic
Male
Female

Figure 2

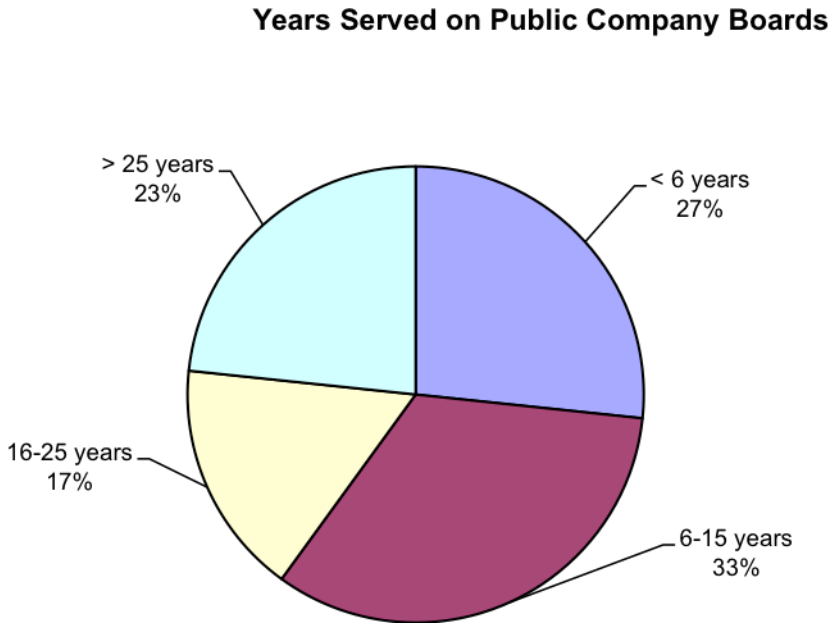


Figure 3

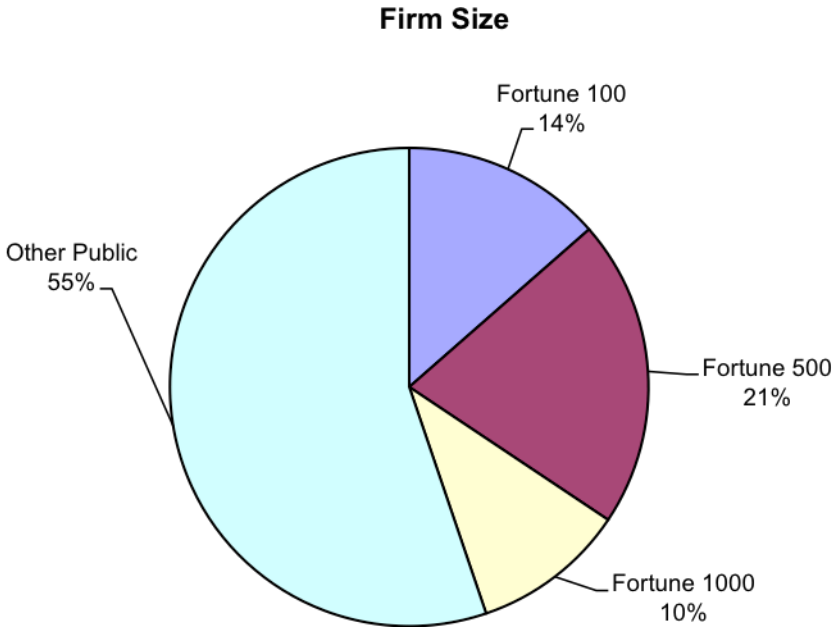


Figure 4

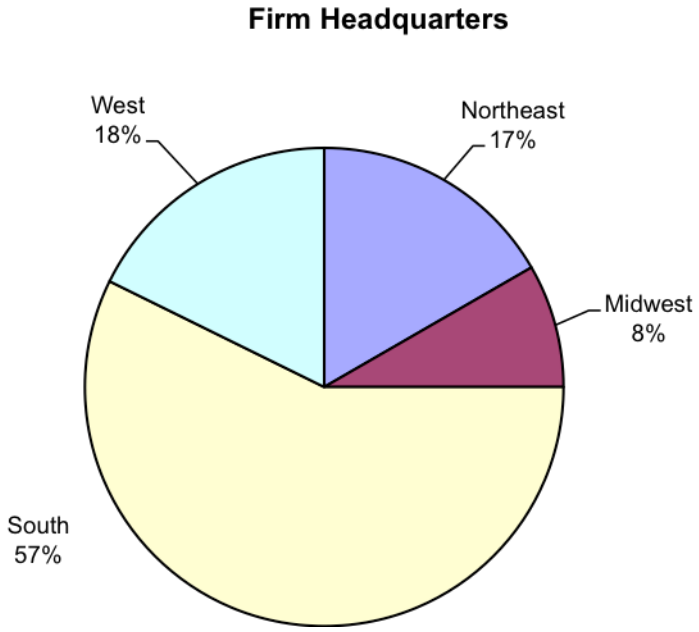
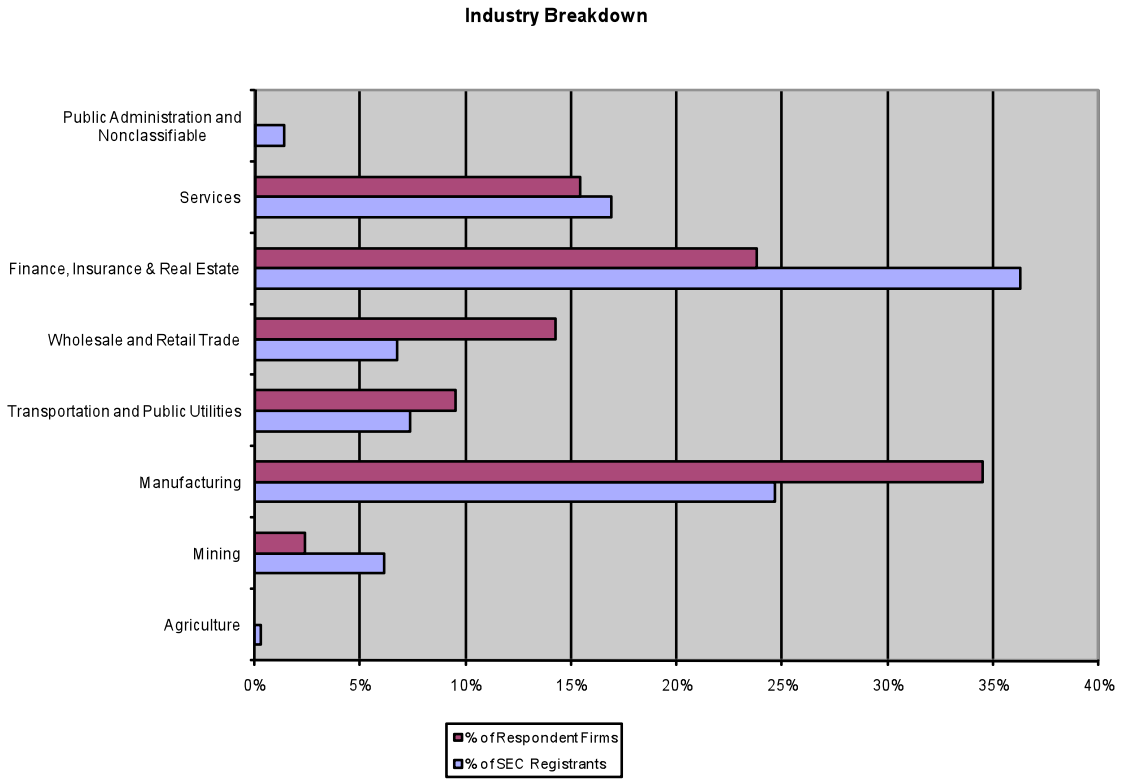


Figure 5


Industry Breakdown
Public Administration and Nonclassifiable
Services
Finance, Insurance & Real Estate
Wholesale and Retail Trade
Transportation and Public Utilities
Manufacturing
Mining
Agriculture
0%
5%
10%
15%
20%
25%
30%
35%
40%
% of Respondent Firms
% of SEC Registrants